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In The

Supreme Court of the United States

October Term, 1993

JAMES POLK and MATTIE POLK,

Petitioners,

VERSUS

DIXIE INSURANCE COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a party may exclude all blacks from a jury based purely upon subjective reasons (improper eye contact).

2. Whether, under the rule of *Batson v. Kentucky*, 476 U. S. 79 (1986), a party is required to give non-racial reasons related to the particular case to be tried before it may peremptorily challenge minority members of a jury.

3. Whether, in view of the apparent impossibility of disproving purely subjective, non-racial reasons given for excluding black members from a jury, this Court should abolish peremptory challenges.

4. Whether, the rule of *Batson v. Kentucky*, supra, permits a litigant to exclude all minority members from a jury panel for reasons the party does not specifically recall, but simply on the basis that counsel's general practice is to exclude jurors who do not make proper eye contact.

5. Whether, consistent with *Batson v. Kentucky*, a party may successfully utilize purely subjective reasons (improper eye contact) to exclude all minority members from a jury.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is published at 972 F. 2d at 83 (5th Cir. 1992), and is included as an Appendix to this Petition.

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit entered on August 4, 1992. This Court has jurisdiction to review by Writ of Certiorari, under 28 USC 1254.

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is United States Constitution Amendment Fourteen, which requires "equal protection of the laws".

STATEMENT OF THE CASE

Black Plaintiffs, James L. Polk and Mattie B. Polk, filed suit in the Circuit Court of Marshall County, Mississippi alleging that the Dixie Insurance Company issued an insurance policy on James L. Polk's 1981 Cadillac and refused payment when the automobile burned. R., Vol. 1, pp. 8-10.

Invoking diversity of citizenship jurisdiction, Dixie Insurance Company removed the case to the United States District Court for the Northern District of Mississippi. R., Vol. 1, pp. 1-4. The removal had the effect of greatly diminishing the prospects of Plaintiffs' having any blacks on a jury, since Marshall County, Mississippi is predominantly black, but the venue site of the United States District Court for the Northern District of Mississippi at Oxford is overwhelmingly white.

Dixie Insurance Company answered the suit claiming that James Polk had intentionally burned his own automobile. R. Vol. 1, pp. 44-58.

The parties were tendered a jury panel consisting of all whites, except two blacks. The attorney for the Dixie Insurance Company exercised two of her three peremptory challenges on these only two prospective black jurors. R., Vol. 4, pp. 1-42.

The District Court denied the request of Plaintiffs' attorney that the Dixie Insurance Attorney be required to state a non-racial reason for excluding both of the blacks from the jury. R., Vol. 4, pp. 29-31.

The all white jury heard all white witnesses on behalf of Dixie Insurance, and all black witnesses on behalf of the Polks.

James Polk testified that the insured automobile was destroyed by fire, when he went to sleep at the wheel during the early morning hours of July 30, 1986. The car accidentally ran off the highway, crashed and burned. R., Vol. 4, p. 96.

On the other hand, the Defendant insurance company presented testimony by a white volunteer fire chief, R., Vol. 4, p. 164, and

its white arson expert, R., Vol. 4, pp. 183-186, that in their opinion, the car was deliberately burned.

The insurance company bolstered racial aspects of the case by asking Polk about his illegitimate children. R., Vol. 4, pp. 105-106.

The all white jury resolved the factual issue in favor of Dixie Insurance. R., Vol. 5, p. 300, R., Vol. 2, p. 490.

On April 11, 1990, the Fifth Circuit affirmed, holding that *Batson v. Kentucky*, 476 U. S. 79 (1986), does not apply to civil suits between private parties. *Polk v. Dixie Ins. Co.*, 897 F. 2d 1346-47 (5th Cir. 1990). This Court reversed. *Polk, supra*, ___ U. S. ___, 115 L. Ed. 2d 965, 111 S. Ct. 2791 (1991).

The Fifth Circuit, on remand, directed the District Court to conduct a hearing as to whether Polk had made a "prima facie" case of racial discrimination, and if so, whether Dixie Insurance Company could show that its challenges were made for non-racial reasons. 943 F. 2d 553 (5th Cir. 1991).

The District Court then held a hearing on the issue of racial motivation for excluding all blacks from the jury. At the hearing, Dixie's attorney testified she did not recall her actual reasons for the decision to remove the only two black jurors from the panel. Rather, defense counsel explained it was counsel's general practice to exclude jurors based on eye contact. Counsel explained the eye contact reasoning as follows;

> "I mean, it is like a blank stare. I can tell you in this instance that in all honesty, I do not have specific details that I can independently recollect because this has been approximately three or four years ago now that I did it.
>
> Therefore, I can tell the Court for sure that the element of eyeball contact is the turning factor in every decision I made in every case that I tried."

R., Vol. 6, pp. 7-8.

District Judge Biggers upheld the challenges. He stated that re-

quiring the trial court to "conduct a little mini-trial in chambers as to why peremptory challenges were exercised....is a ridiculous burden to start placing on the trial courts", R., Vol. 6, p. 22, and that the Court was "reluctant to take the authority away from a lawyer to make a decision". R., Vol. 6, p. 29.

On August 4, 1992, the Fifth Circuit affirmed, holding:

> "We cannot say that eye contact necessarily is a phoney reason when it is proffered as justification for removal of all black jurors...."

Court of Appeals Opinion, p. 7.

ARGUMENT I.

THE WRIT SHOULD BE GRANTED, SINCE THE FIFTH CIRCUIT'S PERMITTING PARTIES TO PEREMPTORILY CHALLENGE ALL MINORITY MEMBERS ON A JURY PANEL, FOR PURELY SUBJECTIVE REASONS (LACK OF EYE CONTACT) NOT RELATED TO THE PARTICULAR CASE TO BE TRIED, IS INCONSISTENT WITH THIS COURT'S DECISION IN *BATSON V. KENTUCKY*, 476 U. S. 79, AND MAKES THE PROTECTION OF *BATSON V. KENTUCKY* ILLUSORY.

The factual scenerio presented in this case is simple. The black Plaintiffs have been deprived of any black members on their jury panel when the defense attorney excludes jurors for subjective reasons (improper eye contact) which cannot possibly be rebutted and which have no relationship to the particular case to be tried.

Had the Fifth Circuit followed specific directives in *Batson*, Dixie could not have removed all blacks from the panel.

The *Batson* majority, through Justice Powell said:

> "nor may the prosecutor rebut the Defendant's case merely by denying that he had a discriminatory motive or affir-

> ming his good faith in making individual selections....If these general assertions were accepted as rebutting a Defendant's prima facie case, the equal protection clause 'would be but a vain and illusory requirement'....The prosecutor, therefore, must articulate a neutral explanation related to the particular case to be tried...."

476 U. S. at 98.

Here, Dixie's attorney did not articulate a neutral explanation *related to the "particular case to be tried"*. Rather, she articulated the "general assertion" that it is always her practice to exclude jurors who do not make proper eye contact. Such a reason will invariably allow the exclusion of racial jurors in every case to be tried.

The Fifth Circuit acted inconsistently with *Batson's* incorporation of the standard of *Texas Dept. of Community Affairs v. Burdine*, 450 U. S. at 258. *Batson* incorporated *Burdine's* holding that the "neutral explanation" must be "clear and reasonably specific", *Batson*, note 21, and *Burdine* specifies that a reason is not "clear and reasonably specific" unless it is precise enough to provide a target upon which Plaintiff may focus a rebuttal. *Burdine, supra*, n. 20. *Accord, Miles v. M.N.C. Corp.*, 750 F. 2d 867 (11th Cir. 1985); *Bryan v. Sky Chief's, Inc.*, 670 F. 2d 864 (9th Cir. 1982). The "articulated reason" — lack of proper eye contact — is not sufficiently precise to allow Plaintiffs to make a rebuttal. Whether a juror is making "proper eye contact" depends exclusively on the mind of the challenging attorney. Whether the attorney perceived the eye contact as hostile or improper, is entirely in the subjective mind of the attorney.

In short, this Court should grant the Writ to establish that lower courts should not construe *Batson* in such a fashion as to make its protections illusory. Rather, the Fifth Circuit should be directed to follow *Batson's* directive that the explanation offered be "reasonably specific" and "related to a particular case to be tried."

Another reason for granting the Writ is that the Fifth Circuit's holding is inconsistent with approaches taken by other Courts of Appeals. Dixie's attorney admitted that she could not recall the specifics

of the case. Rather, she testified that it was her general practice to exclude jurors based upon eye contact. A failure to recall explanation was held an insufficient articulation of a non-racial reason in *Harrison v. Ryan*, 909 F. 2d 34 (3rd Cir. 1990); *Accord, U. S. v. Cunningham*, 713 F. Supp. 165 (M.D. N.C. 1988).

The Fifth Circuit's approach is also inconsistent with that of the Eleventh Circuit in *Barfield v. Orange Co.*, 911 F. 2d 644 (11th Cir. 1990). *Barfield* differentiated using "body language" as a reason for exclusion, from using "eye contact" as a reason for exclusion. Body language might be clear enough for observation in the courtroom; whereas, eye contact, like counsel's "gut feelings", can be verified by nothing in the record other than counsel's own subjective explanation.

This case is unique in permitting purely subjective reasons to be utilized to exclude *all* members of a racial minority. See *United States v. Chincilla*, 874 F. 2d 695 (9th Cir. 1989) (Fact that all minority members were excluded from jury panel requires court to disallow purely subjectively based challenges.); *United States v. Terrazas-Carrasco*, 861 F. 2d 93 (5th Cir. 1988) (Prosecutor's exclusion of some minority members for subjective reasons allowed when he left some minority members on the jury.); *Roman v. Abrams*, 822 F. 2d 214, 228 (General responses regarding "lifestyle" and "background" are inadequate when utilized to exclude all minority members.); *Moore v. Keller Industries, Inc.*, 948 F. 2d 199 (5th Cir. 1991) (Fact that party left a black on the jury "substantially supports" a finding of no discrimination.)

In a separate opinion in *Batson*, Justice White wrote:

> "Any prosecutor can easily assert facially neutral reasons for striking a juror and trial courts are ill-equipped to second guess these reasons. How is the Court to treat a prosecutor's statement that he struck a juror because the juror had a son about the same age as the Defendant, see *People v. Hall*, 35 Calif. 3rd 161, 672 P. 2d 854, (1983) or seemed 'uncommunicative', *King, supra*, at 498, or 'never cracked a smile' and therefore, 'did not possess the sensitivity necessary to realistically look at the issues and decide the facts in this case', *Hall, supra*, at 165, 672 P.

> 2d at 856? If such easily generated explanations are sufficient to discharge the prosecutor's allegation to justify his strikes on non-racial grounds, then the protection erected by the Court today may be illusional."

If all black jurors may be excluded on the grounds that an attorney subjectively believes that eye contact was improper, Justice White's prophecy that *Batson* will be illusory has been fulfilled. If this decision be allowed to stand, and blacks kept off all juries by an attorney's citing a general practice of excluding jurors based upon eye contact, this Court has wasted much effort in *Batson*. If this decision be consistent with *Batson*, then it is time for this Court to face, head on, the issue debated in *Batson* — whether peremptory challenges should be eliminated. See Opinion of Justice Berger in *Batson*, 476 U. S. 112-115 (lamenting *Batson's* limitations on the peremptory challenge, "one of the most important rights" in our justice system); opinion of Justice Renquist in *Batson*, at 476 U. S. at 122-125 (protesting "unprecedented use of the equal protection clause to reject the historic scope of the peremptory challenge".); and the opinion of Justice White, stating that "ideally", the Court should "ban them (peremptory challenges) entirely", and citing *Swain v. Alabama*, 384 U. S. at 244, for the proposition that when there must be a choice between the right of a Defendant to have a jury chosen in compliance with the equal protection clause, and the right to challenge peremptorily, "the Constitution compels the choice of the former". 476 U. S. at 106.

If this case be consistent with *Batson*, that decision has been much ado about nothing, and only the elimination of peremptory challenges will suffice to afford black citizens the right to have blacks on a jury.

Respectfully submitted,

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APPENDIX

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In The

United States Court Of Appeals
For The Fifth Circuit

No. 92-7094
(Summary Calendar)

JAMES L. POLK and
MATTIE B. POLK,

Plaintiffs-Appellants,

versus

DIXIE INSURANCE COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
For the Northern District of Mississippi

(CA-WC-87-43-B-D)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:

In this Mississippi diversity case, the Plaintiffs-Appellants James L. and Mattie B. Polk, who are black, appeal the district court's

overruling of their *Batson*[1] objection to the purported discriminatory exercise of peremptory jury challenges by Defendant-Appellee Dixie Insurance Company. Concluding that the findings of the district court were not clearly erroneous, we affirm.

I

FACTS AND PROCEEDINGS

The Polks sued Dixie Insurance Company (Dixie) for insurance policy proceeds claimed for loss of their car and for bad faith denial of their claim. The district court granted summary judgment for Dixie on the Polks' bad faith denial claim. The policy claim was tried to a jury, which likewise found for Dixie.

During voir dire, Dixie exercised two of its three peremptory challenges to remove the only two black persons on the tendered panel, resulting in an all-white jury. The Polks moved the court to require Dixie's counsel to provide a non-racial reason for her exercise of these two challenges. Before Dixie responded, the court denied the motion on the grounds that *Batson's* prohibition of racial use of peremptory challenges did not extend to private parties. On appeal,[2] we affirmed on the basis of our *en banc* opinion in *Edmonson v. Leesville Concrete Co., Inc.*[3] The United States Supreme Court subsequently reversed our *en banc* opinion in *Edmonson* to hold that *Batson* did apply to civil suits between private parties.[4] In the Polks' case, the Court granted certiorari, vacated our judgment, and remanded the case for further consideration in light of *Edmonson*.[5] On remand, we directed the district court to determine whether the Polks had made a prima facie case of racial discrimination and if so, to allow Dixie the opportunity to show nonracial reasons for its exercise of the peremptories.[6]

Pursuant to our instructions, the district court held a hearing.

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[1] *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L.Ed.2d 69 (1986).

[2] *Polk v. Dixie Ins. Co.*, 897 F2.d 1346 (5th Cir. 1990) *(Polk I)*.

[3] 895 F.2d 218 (5th Cir. 1990).

[4] _____ U. S. _____ 111 S.Ct. 2077, 114 L. Ed.2d 660 (1991).

[5] _____ U.S. _____, 111 S. Ct. 2791, 115 L.Ed.2d 965 (1991).

[6] 943 F.2d 553 (5th Cir. 1991).

After the court found that the Polks had made a prima facie case, Dixie's counsel stated that she could not remember why she had struck the two black jurors, noting that three to four years had elapsed since the 1988 trial of the case. She asserted, however, that eyeball contact must have been the reason because "I can tell the Court for sure that the element of eyeball contact is the turning factor in every decision I make in every case I try." Eyeball contact, she elaborated on cross-examination by the Polks' counsel, "is not just looking at me; it is the expression on their face (sic) when they are looking at me, whether there is a smirk or smile or rolling their eyes; it is the impact of the eyeball contact, if any."

Relying on the trial notes of her assistant, Dixie's counsel proffered secondary reasons. One black member of the venire was an unemployed housewife; Dixie's counsel stated that she generally dismissed unemployed persons and indeed had used her third peremptory in the Polks' case to strike an unemployed white housewife. The other black stricken peremptorily by Dixie worked as an insurance company clerk; defense counsel averred that she always struck persons employed in her client's industry to prevent such person from unduly influencing the jury with their extrajudicial knowledge.

In rebuttal, the Polks presented one of the blacks who had been excluded from the jury, who testified, "I usually look at people when they are talking to me to make sure I can hear what they are saying." At the conclusion of the hearing, the court found that the two black persons had been stricken for non-racial reasons. This appeal followed.

II

ANALYSIS

At trial, proof of a *Batson* claim is a three-step process. First, the complaining party must make a prima facie showing that opposing counsel exercised a peremptory challenge on the basis of race. If that party is successful, the burden shifts to the striking party to articulate a race-neutral explanation for the strike. If the striking party articulates such a reason, the complaining party must show that the reason proffered is pretextual or otherwise inadequate; and the trial court then must determine whether the complaining party has shown the articulated rationale to be pretextual or has otherwise carried the

ultimate burden of proving purposeful discrimination.[7]

On appeal, we turn directly to the ultimate finding of discrimination *vel non* when the striking party has proffered a race-neutral explanation and the trial court has ruled.[8] We review that finding for clear error, according deference to the credibility evaluations which usually inhere.[9] So doing here, we conclude that the district court's finding of no discrimination was not clearly erroneous.

The Polks contend that the confluence of two circumstances precludes a finding that Dixie articulated a race-neutral explanation. One such circumstance is that Dixie's counsel admitted that she had no specific memory of the strikes in dispute. The other is that she offered a subjective explanation — eye contact — as the most likely reason for her strikes.

That a lawyer would forget why he or she had struck particular jurors years earlier is not surprising, especially when the then-controlling law required no reasons. Nonetheless, when an attorney offered virtually nothing beyond, "I do not remember," the Third Circuit in *Harrison v. Ryan*[10] found that the striking party failed to carry its burden. That is not the situation here. Dixie's counsel maintains that she must have relied on eyeball contact because she always does and may have relied on other race-neutral factors in line with guidelines she generally follows. Under similar circumstances, the Eighth Circuit has found the striking party's burden satisfied.[11] We see no reason to take a contrary position in light of the time lapse between juror selection and the *Batson* hearing. When the applicability

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[7] *Hernandez V. New York*, _____U.S._____, 111 S. Ct. 1859, 1865-66, 114 L.Ed.2d. 395 (1991) (plurality), citing *Batson*, 476 U.S. at 96-98, 106 S.Ct at 1722-24; *Moore v. Keller Industries, Inc.*, 948 F.2d 199, 201-202 (5th Cir. 1991), *cert. denied*, _____U.S._____, 112 S. Ct. 1945, 118 L.Ed.2d 550 (1992), *United States v. Clemons*, 941 F.2d 321, 323 (5th Cir. 1991).

[8] *Hernandez*, 111 S.Ct. at 1866; *United States v. Forbes*, 816 F.2d 1006, 1010 (5th Cir. 1987).

[9] *Clemons*, 941 F.2d at 325.

[10] 909 F.2d 84, 87 (3rd Cir.), *cert. denied*, _____ U.S. _____, 111 S.Ct. 568, 112 L.Ed.2d 574 (1990).

[11] *See United States v. Nicholson*, 885 F.2d 481 (8th Cir. 1989); *United States v. Wilson*, 867 F.2d 486 (8th Cir.), *cert. denied*, 493 U.S. 827, 110 S.Ct. 92, 107 L.Ed.2d 57 (1989).

of *Batson* is clear at trial and contemporaneous explanation is required, lapse of memory would trigger more serious concerns.

Nevertheless, the Polks argue that Dixie's reliance on an unverifiable subjective consideration such as eye contact casts further doubt on its justification. We disagree. Jurisprudentially, it is too late in the day to contend that eye contact fails to satisfy the striking party's burden of articulating a neutral explanation. Recognizing that "the decision to exercise a peremptory challenge ... is subjective"[12] and often "influenced by intuitive assumptions, "[13] we have explicitly accepted eye contact (or lack thereof) as a legitimate rationale.[14] In the *Batson* context, subjective considerations might not be susceptible to objective rebuttal or verification. We nonetheless permit them because of the inherent nature of peremptory challenges, with the understanding that ultimate *Batson* findings "largely will turn on evaluation of credibility"[15] of counsel's explanation.

The Polks attempt to distinguish our cases accepting eye contact as a neutral explanation by arguing that some black persons remained on the jury in those cases but all were dismissed here. We understand this as an argument that a subjective consideration like eye contact is inadequate to counter the heightened inference of discrimination arising when the striking party accepts no black jurors. We decline to establish such a per se rule. Whether the striking party was or was not motivated by its proffered explanation is a fact-intensive question which must be decided case by case in light of the totality of circumstances.

We cannot say that eye contact necessarily is a phony reason when it is proffered as justification for removal of all black jurors. On the record in this case, the trial court's conclusion that Dixie's counsel was not motivated by racial consideration is a permissible view of the evidence.

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[12] *Thomas v. Moore*, 866 F.2d 803, 805 (5th Cir.), *cert. denied*, 493 U. S. 840, 110 S. Ct. 124, 107 L.Ed.2d 85 (1989).

[13] *United States v. Lance*, 853 F.2d 1177, 1181 (5th Cir. 1988).

[14] *Id.*; *United States v. Terrazas-Carrasco*, 861 F.2d 93, 94-95, n. 1 (5th Cir. 1988); *United States v. Cartlidge*, 808 F.2d 1064, 1071 (5th Cir. 1987).

[15] *Batson*, 476. U.S. at 98, n. 21, 106 S. Ct. at 1724, n. 21.

Finally, the Polks point to an explanation for the strikes presented by Dixie in an earlier appeal and object to the expansion on that explanation introduced at the *Batson* hearing. *United States v. Romero-Reyna*[16] involved an analogous situation. At a *Batson* hearing conducted on remand, the prosecutor "essentially repeated a fuller version of the explanation offered at the sidebar conference, which had immediately followed completion of jury selection, plus an additional reason for excluding the pipeline operator."[17] There, we deferred to the trial court's assessment of whether the added reason was legitimate and credible. Finding no inconsistency between Dixie's earlier and later explanations, we do the same here.

AFFIRMED.

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[16] 889 F.2d 559 (5th Cir. 1989), *cert. denied*, 494 U.S. 1084, 110 S.Ct. 1818, 108 L.Ed.2d 948 (1990).

[17] 889 F.2d at 562.